IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- 763

WALTER S. BRACKETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner Walter S. Brackett, Plaintiff-Appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 18, 1977.

Opinion Below

The order of the United States District Court for the District of Columbia is not reported and is reproduced at A. 20 of the Appendix. The Judgment of the panel of the United States Court of Appeals for the District of Columbia Circuit (A. 21) is not reported. The opinion of the Court of Appeals (*en banc*) on the issue of retrospective application of *Dorszynski* v. *United States*, 418 U.S. 424 (1974), (A. 1) is not reported.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1970). The judgment of the Court of Appeals was entered on July 18, 1977. By order dated October 6, 1977, the Chief Justice extended the time in which a petition for writ of certiorari may be filed to and including November 28, 1977.

Questions Presented

This case presents the following important questions concerning the retrospective applicability of four decisions of this Court regarding the constitutional and statutory rights of juveniles and others charged with criminal offenses:

1. Should the Court's decisions in *Kent* v. *United States*, 383 U.S. 541 (1966)—where the Court held that a child is entitled to notice, a hearing, and counsel at a juvenile court proceeding to determine whether the child is to be prosecuted as an adult or treated as a juvenile—and in *In re Gault*, 387 U.S. 1 (1967)—where the Court made clear that the rule in *Kent* is a constitutional one—be given retrospective application? The Circuits and state supreme courts are in conflict on this question.

2. Should the Court's decision in *Dorszynski* v. *United States*, 418 U.S. 424 (1974)—where the Court held that the Federal Youth Corrections Act requires a district court, before sentencing a child to an adult sentence, to make an explicit finding that the child would not benefit from sentencing pursuant to that Act—be given retrospective application? The Circuits are in conflict on this question.

3. Should the Court's decision in *United States* v. *Tucker*, 404 U.S. 443 (1972)—where the Court held that, in imposing a sentence, a district court may not take into account previous convictions that were constitutionally deficient because obtained in violation of the defendant's right to counsel—be given retrospective application?

Statutes and Regulations Involved

Section 2255 of 28 U.S.C. (1970), the Federal Youth Corrections Act, 18 U.S.C. §§ 5006, 5010, and 5017 (1970), and Sections 11-906, 11-907, and 11-914 of the District of Columbia Juvenile Court Act (1961) are set forth in the Appendix to this Petition. (A. 23-27.)

Statement of the Case

A. *Preliminary Statement*

This case arises out of a homicide in 1960 at the National Training School for Boys. Petitioner, who was 14 years of age at the time of the offense, was subsequently made the subject of proceedings in the District of Columbia Juvenile Court and in the United States District Court for the District of Columbia (hereinafter "trial court") which, on the basis of subsequent holdings of this Court, were unconstitutional or contrary to federal statutory requirements, in three respects:

First, in September 1960, the District of Columbia Juvenile Court waived its exclusive jurisdiction over petitioner, then age 15, without affording him effective assistance of counsel, prior notice, or a hearing. Less than a year later Morris A. Kent, age 16, was ushered through the D.C. Juvenile Court processes in the same fashion as petitioner here had been, except that Kent had a lawyer whom the Juvenile Court ignored, while petitioner Brackett had no lawyer at all. In 1966 in *Kent* v. *United States*, *supra*, this Court found that this treatment of Kent violated provisions of the District of Columbia Juvenile Court Act. In 1967 in *In re Gault*, *supra*, the Court made clear that such treatment is also unconstitutional.

Second, the trial court, in sentencing petitioner as an adult in 1961, made no explicit finding that petitioner would not benefit from sentencing under the Federal Youth Corrections Act, and indeed made representations on the record indicating beyond doubt that its sentencing disposition was made without regard to the rehabilitative goals of the Act. In 1974 in *Dorszynski* v. *United States*, *supra*, this Court held that the omission of such an explicit finding is error, requiring remand for reconsideration of the question and, if appropriate, resentencing.

Finally, at petitioner Brackett's 1961 sentencing, the trial court gave explicit attention to petitioner's earlier juvenile convictions—convictions which, petitioner has asserted without contradiction, were obtained in violation of his constitutional right to counsel. In 1972 in *United States* v. *Tucker*, *supra*, the Court held that a 1953 sentence for bank robbery must be vacated because the sentencing court had given "explicit attention" to previous convictions that were invalid because obtained in violation of the constitutional right to counsel.

In short, if petitioner Brackett had in 1960 been afforded the safeguards that, according to this Court, should have obtained in Kent's juvenile waiver hearing in 1961, petitioner might never have been prosecuted as an adult. If the trial court that sentenced petitioner in 1961 had properly considered whether petitioner would benefit from sentencing under the Youth Corrections Act, petitioner might never have been sentenced as an adult. And if the trial court had excluded from its consideration petitioner's prior invalid convictions, petitioner might have received a less harsh sentence. But petitioner had the benefit of none of these safeguards. In consequence, petitioner, at age 15, received the maximum and harshest sentence available for adults for conviction of manslaughter—not less than five nor more than 15 years

—with recommendations that he be confined to a maximum security institution and not receive parole.

This case thus presents in stark terms the questions whether the Court's decisions in *Kent*, *Gault*, *Dorszynski*, and *Tucker* should be given retrospective application. The courts below answered this question in the negative with respect to each decision, though other Circuits and state supreme courts have reached contrary conclusions.

B. *Facts*

On September 13, 1960, petitioner Brackett, age 14, and two older boys, ages 16 and 17, were charged in District of Columbia Juvenile Court with having committed assault with a deadly weapon two days earlier on an officer of the National Training School for Boys.[1] The boys, who had been confined to the school, were accused of striking and injuring the officer in the course of an escape attempt, and the Government petitioned the Juvenile Court to commence noncriminal proceedings against petitioner.

A month later, the officer suffered a kidney failure and died. Prosecuting attorneys immediately asked the Juvenile Court to waive its exclusive jurisdiction over petitioner so that he could be tried as an adult on charges of first-degree murder. Four days later, the Juvenile Court waived jurisdiction without affording petitioner the benefit of counsel, prior notice, or a hearing. (A. 28.)

On November 7, 1960, an indictment was filed charging petitioner and the other boys with first-degree murder in violation of D.C. Code § 22-2401 (1973) and with murder of an officer of the United States in violation of 18 U.S.C. § 1114 (Supp. V 1975). On January 30, 1961, trial began before the late Judge Alexander Holtzoff. Petitioner initially entered a plea of not guilty

[1] Petitioner was born on September 14, 1945, and thus turned 15 on the day after these charges were filed.

but, after his co-defendants pled guilty to manslaughter charges and the court applied substantial pressure to petitioner's counsel,[2] petitioner agreed to plead guilty to manslaughter, too.

At sentencing, the trial court rejected the request of petitioner's counsel that petitioner, by then age 15, be sentenced under the Federal Youth Corrections Act or that petitioner's youth otherwise be considered a mitigating factor. (A. 42.) The court's approach to the sentencing was purely retributive and reflects no consideration of whether petitioner would benefit from treatment under the Youth Corrections Act—much less an explicit finding that he would not:

> "The fact that these defendants are young is not a mitigating circumstance so far as their crime is concerned. They are really murderers. They were allowed to plead guilty to manslaughter, but their acts could have been held by the jury to constitute murder. They were prisoners in the National Training School for Boys, having been committed under the Federal Juvenile Delinquency Act for stealing automobiles. Each of them has a bad record before this present commitment. They were in a dormitory with 80 other prisoners. There was only one guard during the night. He sat inside, immediately inside the dormitory, at a desk. The door of the dormitory was locked. . . .
>
> "These two defendants, in conjunction with the third defendant, Jankowski, plotted to overpower the

[2] At trial, petitioner relied on, *inter alia*, an insanity defense. In support, he had offered a psychiatrist's report and several witnesses' testimony that petitioner looked "wild" or "crazy" during his participation in the assault. Transcript of sentencing, March 10, 1961, at 224-25, 235, 273. Judge Holtzoff suggested that petitioner should ignore the insanity defense, that the defense was not made in good faith, and that it was worthless (A. 30-31). He further berated petitioner's counsel as "immature" and as showing lack of "mature judgment" because petitioner's counsel declined to advise petitioner to plead guilty (A. 30, 35).

> officer, get the keys from him and make an escape during the night. Brackett, although he is the youngest of the three, was the ring leader and he is apparently the most vicious of the three.
>
> "By a prearranged signal they got out of their beds and walked to the desk and Brackett grabbed a big heavy brass lamp and began to beat the guard over the head with that lamp and, in addition to that, used a big broom. McCracken, according to the evidence, participated in the beating by hitting the guard with his fist. The guard was screaming and pleading for help but Brackett, particularly, did not let up the beating.
>
> "The guard was eventually found on the floor in a pool of blood. He was in a coma for a week and three weeks later he died of this attack.
>
> "Now, obviously this is not a case for the Youth Corrections Act, both because of the nature of the offense and the nature of the prior records of these defendants. *The Court is more interested in the fate that befell the guard than it is in the future of these two boys.*
>
> "Now, if they have a spark of humanity—and every human being has; some have a greater spark and some a lesser, but everyone has—they will lie awake many a night in a feeling of remorse for what they have done, and if they have any spark of humanity they will spend many an hour on their knees praying to God and imploring God to forgive them.
>
> "Now, Brackett has shown vicious tendencies. In addition to plotting the escape plan involved in this case, after he pleaded guilty he tried to escape from the Marshal's van. He needs incarceration in a maximum security institution." (A. 42-43.) (Emphasis added.)

Moreover, in determining what adult sentence petitioner should receive, the trial court gave explicit attention to petitioner's prior juvenile convictions. As the foregoing excerpt from the sentencing transcript reflects, the court rejected a request for leniency and for commitment under the Youth Corrections Act because petitioner and one of his co-defendants had

> "been committed under the Federal Juvenile Delinquency Act *for stealing automobiles. Each of them has a bad record . . . .*" (A. 42.) (Emphasis added.)

The court also rejected Youth Corrections Act treatment "because of the nature of the offense *and the nature of the prior records of these defendants*" (A. 43) (emphasis added). The court accordingly gave petitioner the maximum sentence: not less than five nor more than 15 years. The court also recommended that petitioner be committed to "a Federal institution of the maximum security type" (A. 43) and that "he receive no parole."[3]

C. *Litigation*

On December 10, 1969, petitioner filed a *pro se* motion under 28 U.S.C. § 2255 to vacate his conviction and sentencing. Civ. No. 3497-69. Petitioner was released on parole before the motion was heard, but when his parole was revoked in 1973, petitioner began efforts to reinstate the motion.[4] He sent letters and a new motion to the clerk of the District Court, to various District judges,

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[3] Transcript of sentencing of Bernard J. Jankowski, March 30, 1961, at 7.

[4] Petitioner was imprisoned until August 1, 1967, for the manslaughter conviction described in the text above. After each of two subsequent convictions, in 1969 in Alabama and in 1973 in South Carolina, petitioner's federal parole was revoked and petitioner served additional time on his original federal sentence. Petitioner was convicted of a further offense in July 1977 and is now imprisoned in the DeKalb County Jail in Decatur, Georgia. Of petitioner's original 15 year sentence for manslaughter, almost five years (1724 days) remain.

and to a lawyer who had been appointed to represent him when petitioner first filed the original motion. After meeting with no success, he sought a writ of mandamus from the Court of Appeals, and Judges Bastian and Robb remanded his motion to the District Court for consideration.[5]

The renewed motion alleged that petitioner's original conviction and sentencing were invalid because, *inter alia*: (1) the trial court had lacked jurisdiction since petitioner had been denied counsel and a hearing at his Juvenile Court waiver proceeding; (2) the trial court had failed to make a finding that he would not benefit from sentencing under the Youth Corrections Act; and (3) in sentencing him, the trial court had taken into account previous juvenile convictions that were invalid because they were obtained without providing him, as an indigent, the assistance of counsel. (A. 47-57).

The Government opposed petitioner's motion on August 5, 1974 (A. 58-65), and the District Court (Green, D.J.) denied the motion the next day, without holding a hearing or appointing counsel for petitioner.[6] The court subsequently denied petitioner's request for leave to proceed *in forma pauperis* on appeal, as well, and stated that it had denied petitioner's Section 2255 motion for the reasons set forth in the Government's opposition. (A. 66.)[7]

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[5] Order dated May 16, 1974 (A. 45).

[6] Order of August 6, 1974 (A. 20).

[7] With respect to petitioner's first contention the Government had argued that *Kent* is not to be given retrospective application. In response to petitioner's argument that the trial court had failed to make a "no benefit" finding, the Government had said that the court need not state "reasons" for refusing to impose a sentence under the Youth Corrections Act. The Government's only response to petitioner's *Tucker* allegations had been that petitioner had not specified which prior convictions were improperly considered by the trial court.

The Court of Appeals did allow petitioner to proceed *in forma pauperis* and appointed counsel on appeal,[8] but on December 10, 1975 (A. 21), a division of the court affirmed without opinion.[9] Petitioner's suggestion for rehearing *en banc* was granted on July 16, 1976, on the question whether *Dorszynski* should be given retrospective application.

On July 18, 1977, the Court of Appeals affirmed, with two judges (MacKinnon and Robb, JJ.) concurring specially, and two (Bazelon, C.J., and Robinson, J.) dissenting. The majority found (1) that the trial court had, in sentencing petitioner, made an implicit but not an explicit finding that petitioner would not benefit from sentencing under the Youth Corrections Act, and (2) that *Dorszynski* should not be given retrospective application. Judges MacKinnon and Robb were of the view that *Dorszynski* does not require "an *explicit* finding of 'no benefit' in all instances" (emphasis in original) and thus that *Dorszynski* required nothing more than that which occurred in petitioner's case. Chief Judge Bazelon and Judge Robinson dissented because they believed that the record reflected neither an express nor an implied finding of no benefit "and thus conclude[d] that under either a pre- or post-*Dorszynski* standard the sentencing judge failed

[8] Petitioner's counsel before the Court of Appeals was obliged to withdraw in September 1977 and requested present counsel to assume representation of petitioner.

[9] On appeal before the division, petitioner advanced, *inter alia*, the three arguments set forth in the text above, see page 9, *supra*, that were presented to the District Court. The Government responded, in opposition, (1) that, as previously held by the District of Columbia Circuit in *Mordecai* v. *United States*, 137 U.S. App. D.C. 198, 421 F.2d 1133 (1969), *cert. denied*, 397 U.S. 977 (1970), *Kent* should not be given retroactive effect, (2) that the trial court was sufficiently clear in its finding that petitioner would not benefit from Youth Corrections Act sentencing, and (3) that the record does not show reliance by the trial court on a prior conviction obtained in violation of petitioner's right to counsel.

to give the required degree of attention to the possibility of a Youth Corrections Act sentence." [10]

Reasons for Granting the Writ

This case involves a ruling on important questions of criminal procedure under the Constitution and laws of the United States as to which the Courts of Appeals and the states' highest courts are in conflict.[11] Petitioner brings to this Court important and recurring issues of wide application involving the temporal reach—prospective only or retrospective—of four significant decisions of the Court that broadly affect the rights and interests of juveniles and others in the criminal justice system. Cases raising these issues have been reaching the Courts of Appeals since the late 1960s and continue to arise, producing different rules of law in different forums.

Moreover, the failure of the Circuits and the states uniformly to give retrospective effect to *Kent*, *Gault*, *Dorszynski*, and *Tucker* runs counter to the principles established by this Court concerning retroactivity. The Court has described as follows the criteria guiding resolution of the question of retroactivity of new rules of criminal procedure:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroac-

[10] A. 15.

[11] In addition to the issues presented here, petitioner argued to the Court of Appeals that the trial court's intrusion into the plea-bargaining process deprived petitioner of effective assistance of counsel. See note 2, *supra*. Although petitioner believes that the decision below on this point is wrong and that the trial judge abused his discretion in coercing petitioner to abandon his legitimate insanity defense, petitioner recognizes that this aspect of the case is not of sufficient general importance to warrant review by this Court at this time.

tive application of the new standards." *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967).

"Foremost among these factors is the purpose to be served by the new . . . rule." *Desist* v. *United States*, 394 U.S. 244, 249 (1969) (footnote omitted). In fact, the Court has "given complete retroactive effect to the new rule, regardless of good-faith reliance by law enforcement authorities or the degree of impact on the administration of justice, where the 'major purpose of new constitutional doctrine is *to overcome an aspect of the criminal trial that substantially impairs its truth-finding function* and so raises serious questions about the accuracy of guilty verdicts in past trials . . .'." *Adams* v. *Illinois*, 405 U.S. 278, 280 (1972), *quoting Williams* v. *United States*, 401 U.S. 646, 653 (1971) (emphasis added).

The Court has also given retrospective application both to procedural rules that affect important factfinding at stages of the criminal process other than the trial and to rules that ensure the integrity of stages that do not involve factfinding. It has, for example, applied not only the right to counsel at trial retroactively, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), but also the right to counsel on appeal, established in *Douglas* v. *California*, 372 U.S. 353 (1963);[12] the right to counsel at arraignments where pleas are entered and defenses are pled or waived, established in *White* v. *Maryland*, 373 U.S. 59 (1963),[13] and in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); and the right to counsel at dispositional proceedings, established in *Mempa* v. *Rhay*, 389 U.S. 128 (1967).[14] The purpose of these rules is to ensure the careful and focused making of certain critical determinations which may have the most important consequences for a criminal defendant.

[12] See *Smith* v. *Crouse*, 378 U.S. 584 (1964).

[13] Held retroactive in *Arsenault* v. *Massachusetts*, 393 U.S. 5 (1968).

[14] See *McConnell* v. *Rhay*, 393 U.S. 2 (1968).

We demonstrate below that the procedural rules articulated in *Kent* and *Gault* are, for purposes of the Court's stated retroactivity test, indistinguishable from the rules in *Hamilton* and *Mempa* and thus should be applied retrospectively. The rules of *Dorszynski* and *Tucker*, while less closely analogous to those in *Hamilton* and *Mempa*, are essential to the integrity of the sentencing process and thus should also be retroactive. Finally, the conflict among the Circuits and the state supreme courts on retroactivity of these cases should be resolved.

A. *The Decision below Not to Give* Kent *Retrospective Application Conflicts with the Standards Prescribed by This Court for Retroactivity of Its Rulings on Criminal Procedure and with Decisions of Other Circuits and of State Supreme Courts.*

In *Kent* this Court held that, "in the context of constitutional principles relating to due process and the assistance of counsel,"[15] Morris A. Kent was entitled under the District of Columbia Juvenile Court Act to notice, a hearing, and effective assistance of counsel before the Juvenile Court could validly waive its exclusive jurisdiction over him and refer him to the District Court for prosecution as an adult. The court said:

> "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not." 383 U.S. at 554.

[15] 383 U.S. at 557 (footnote omitted).

Gault made clear that *Kent*'s requirements are constitutionally based and thus are applicable in all jurisdictions.

There are two reasons why the Court should hear and determine the question whether these principles of *Kent* and *Gault* should be given retrospective application. First, retrospective application is compelled under the standards laid down by this Court in *Stovall*, *Desist*, and *Williams*. Second, the Courts of Appeals and the state supreme court are in conflict on the question.

1. *The Standards of* Stovall, Desist, *and* Williams *Require Retrospective Application of* Kent *and* Gault.

The rule articulated in *Kent* is designed to overcome an aspect of the criminal process "that substantially impairs its truth-finding function." *Williams* v. *United States*, 401 U.S. at 653. The Juvenile Court is "engaged in determining the needs of the child and of society rather than adjudicating criminal conduct," *Kent* v. *United States*, 383 U.S. at 554, but the process of "determining" in a waiver proceeding whether the child is susceptible of rehabilitation is no less factfinding than is the process of determining at trial whether the defendant is innocent or guilty. And the safeguards recognized in *Kent* were plainly designed to assure the integrity of this factfinding process. Indeed, the rule articulated in *Kent* added far more than a fillip that enhanced the reliability of that factfinding proceeding. *Cf. Stovall* v. *Denno*, 388 U.S. at 299-301. For all practical purposes, *Kent* established the existence of the proceeding—notice, hearing, right to counsel, and statement of reasons—for the District of Columbia.

The "special rights and immunities" conferred by the Juvenile Court Act are, moreover, "critically important."

Kent v. *United States*, 383 U.S. at 556. Under the Act, the child "may not be jailed along with adults. He may be detained, but only until he is 21 years of age. . . . The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment." *Id.* at 556-57. Most significantly in Kent's case—*just as in the case of petitioner Brackett*—the difference between Juvenile Act and adult treatment could have been "the difference between five years' confinement [six for Brackett] and a death sentence." *Id.* at 557. In short, the factfinding proceeding that the Juvenile Court undertakes in considering waiver could not be of greater moment, particularly in connection with offenses of the gravity of those with which petitioner Brackett was charged.

Moreover, the failure of the courts below to apply *Kent* and *Gault* retroactively cannot be reconciled with the Court's determination to give retrospective application to *Hamilton* v. *Alabama*, *supra*, and *Mempa* v. *Rhay*, *supra*.

In *Mempa* the Court held that a criminal defendant is entitled to counsel at all dispositional proceedings, including those not formally part of the "sentencing" hearing immediately after a finding of guilt. The court said:

> "[T]he necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent." *Mempa* v. *Rhay*, 389 U.S. at 135.

And in later holding this right to counsel at dispositional proceedings to be fully retroactive,[16] the Court found

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[16] *McConnell* v. *Rhay*, *supra*.

that it "relates to 'the very integrity of the fact-finding process.' " [17]

The Court has also recognized the equally great need for counsel in juvenile proceedings:

> "[I]n all cases children need advocates to speak for them and guard their interests, particularly when disposition decisions are made. It is the disposition stage at which the opportunity arises to offer individualized treatment plans and in which the danger inheres that the court's coercive power will be applied without adequate knowledge of the circumstances." *In re Gault*, 387 U.S. at 38-39 n.65, quoting from *Report by the President's Commission on Law Enforcement and Administration of Justice*, "The Challenge of Crime in a Free Society" (1967).

It is clear, in light of the enormous consequences of juvenile court waiver proceedings, that such proceedings are at least as dispositional in nature as sentencing proceedings. And the same kind of factfinding occurs at waiver proceedings.

In *Hamilton* the Court held that a criminal defendant is entitled to counsel at an arraignment hearing where he will be required to plead or waive certain defenses, including insanity. 368 U.S. at 53. Although this rule is not designed to prevent errors in determining whether the defendant committed the offense in question, it is essential to determining the defendant's guilt or innocence. One who pleads an insanity defense does not deny having engaged in prohibited conduct but rather asserts that the conduct should not be treated as criminal because of his diminished capacity at the time of the conduct.

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[17] *Id.* at 3, *quoting Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965).

The same reasoning compels the retroactivity of *Kent* and *Gault*. At a juvenile court waiver proceeding, a juvenile defendant has the opportunity to present a defense that, if successful, is analogous to the insanity defense in *Hamilton*: that, because of his diminished capacity and potential for rehabilitation as a juvenile, he should not be held accountable for conduct that would otherwise be treated as criminal. At the waiver proceeding the juvenile must not only plead that "defense"; he must try it, for the juevnile court determines, in most cases finally, whether the defendant is to be exempted from the full force of adult criminal prosecution.

2. *The Courts of Appeals and the State Supreme Courts Are in Conflict on This Question.*

Sharp conflicts exist among the Courts of Appeals and the state supreme courts on the *Kent/Gault* retroactivity question. The Fourth and Tenth Circuits have given *Kent* and *Gault* retrospective application,[18] while the Fifth and D.C. Circuits have not,[19] and in an *en banc* decision the Ninth Circuit overruled an earlier decision applying *Kent* retrospectively.[20] Similarly, while the highest courts of some states have treated *Kent* and *Gault* as retroactive, others have not.[21]

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[18] *Brown* v. *Cox*, 481 F.2d 622 (4th Cir. 1973) (*en banc*), *cert. denied*, 414 U.S. 1136 (1974); *Kemplen* v. *Maryland*, 428 F.2d 169 (4th Cir. 1970); *Heryford* v. *Parker*, 396 F.2d 393 (10th Cir. 1968).

[19] *Brown* v. *Wainwright*, 537 F.2d 154 (5th Cir. 1976); *Mordecai* v. *United States*, *supra*, and the instant case.

[20] *Harris* v. *Procunier*, 498 F.2d 576 (9th Cir.) (*en banc*), *cert. denied*, 419 U.S. 970 (1974), *overruling Powell* v. *Hocker*, 453 F.2d 652 (9th Cir. 1971). See also *Smith* v. *Cady*, 452 F.2d 141 (7th Cir. 1971), and *Brown* v. *New Jersey*, 395 F.2d 917 (3d Cir. 1968), declining to address the issue; and *Smith* v. *Yaeger*, 459 F.2d 124, 127 (3d Cir. 1972), suggesting in *dictum* that "limited retroactivity may be appropriate."

[21] *Compare, e.g., Marsden* v. *Commonwealth*, 352 Mass. 564, 227 N.E.2d 1 (1967); *State* v. *Lueder*, 137 N.J. Super. 67, 347 A.2d

The courts rejecting retrospective application have without exception failed properly to apply the test of *Adams* v. *Illinois* and *Williams* v. *United States*—that retroactive effect shall be given, regardless of any reliance by law enforcement authorities or impact on the administration of justice,

> "where the 'major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials . . . .'" [22]

These courts have focused on perceived reliance by courts on pre-*Kent* rulings, on feared adverse effects of retroactivity on the criminal justice system, and on supposed impediments to providing a satisfactory remedy. *E.g.*, *Harris* v. *Procunier*, 498 F.2d at 579; *Mordecai* v. *United States*, 137 U.S. App. D.C. at 201-04, 421 F.2d at 1136-39. See also *Brown* v. *Cox*, 481 F.2d at 627-28 In *Harris*, for example, the Ninth Circuit quoted the reference in *Williams* to rules designed to serve the

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805 (1975); *State* v. *Circuit Court*, 37 Wis.2d 329, 155 N.W.2d 141 (1967), applying *Kent* and *Gault* retrospectively, *with e.g.*, *Arizona* v. *Martin*, 107 Ariz. 444, 489 P.2d 254 (1971) (*en banc*); *In re Harris*, 67 Cal.2d 876, 64 Cal. Rptr. 319, 434 P.2d 615 (1967) (*en banc*); *Florida* v. *Steinhauer*, 216 So.2d 214 (Fla. 1968), *cert. denied*, 398 U.S. 914 (1970); *Smith* v. *Commonwealth*, 412 S.W.2d 256 (Ky. Ct. App.), *cert. denied*, 389 U.S. 873 (1967); *State* v. *Hance*, 2 Md. App. 162, 233 A.2d 326 (1967); *People* v. *Terpening*, 16 Mich. App. 104, 167 N.W.2d 899 (1969); *Powell* v. *Sheriff*, 85 Nev. 684, 462 P.2d 756 (1969); *Bouge* v. *Reed*, 254 Ore. 418, 459 P.2d 869 (1969) (*en banc*); *Commonwealth* v. *James*, 440 Pa. 205, 269 A.2d 898 (1970); *Cradle* v. *Peyton*, 208 Va. 243, 156 S.E.2d 874 (1967), *cert. denied*, 392 U.S. 945 (1968); *Brumley* v. *Charles R. Denney Juvenile Center*, 77 Wash.2d 702, 466 P.2d 481 (1970) (*en banc*), applying *Kent* and *Gault* prospectively only.

[22] *Adams* v. *Illinois*, 405 U.S. at 280, *quoting Williams* v. *United States*, 401 U.S. at 653.

truth-finding function of "the criminal trial" [23] and grounded its decision on the theory that "a certification hearing is not a trial, but a hearing." 498 F.2d at 579. That distinction fails to account for the Court's decisions giving retrospective application to such cases as *Hamilton*, *Mempa*, and *Douglas* v. *California*, *supra*, and thus is clearly without merit.

Nor does the supposed difficulty of devising a remedy justify the failure to apply *Kent* retroactively. In *Mordecai*, where a 24 year old petitioner sought to have his conviction vacated because of a waiver proceeding that did not conform to *Kent* standards, the Court denied relief because of "the impossibility of according the appellant an adequate remedy. . . ." 421 F.2d at 1139. No remedy was possible, according to the Court, because the Juvenile Court no longer had jurisdiction over the petitioner and "nonpunitive rehabilitation" would no longer be available. *Id.* at 1138. In *Kent*, however, the Supreme Court specifically rejected this very contention: It remanded to the District Court for a hearing *de novo* on waiver. "If that court finds that waiver was inappropriate, petitioner's conviction must be vacated." 383 U.S. at 565. If waiver was determined to be proper, the District Court was directed to enter "an appropriate judgment," *id.*, presumably dismissing the habeas corpus petition. See also *United States* v. *Rundle*, 438 F.2d 839 (3d Cir. 1971).

B. *The Decision below Not to Give Retrospective Effect to* Dorszynski *Conflicts with the Standards Prescribed by This Court for Retroactivity and with Decisions of Other Circuits.*

In *Dorszynski* this Court recognized that in the Federal Youth Corrections Act, enacted in 1950,[24] Congress had

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[23] 401 U.S. at 653.

[24] 18 U.S.C. §§ 5005-5026, 64 Stat. 1087.

expressed its legislative judgment that federal courts must accord young offenders special consideration in imposing sentences. "The Act was . . . designed to provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket [16 to 22], to rehabilitate them and restore normal behavior patterns." *Dorszynski* v. *United States*, 418 U.S. at 433. The Act therefore provides that, before a court may sentence an eligible offender under the penalty provision that would govern in the Act's absence, "the court shall find that the youth offender *will not derive benefit*" from the rehabilitative alternatives provided in the Act. 18 U.S.C. § 5010(d).

In *Dorszynski* the Court held that the "no benefit" finding must be explicit. 418 U.S. at 444. It noted that any different requirement would leave "unclear whether . . . the court believed petitioner to be legally ineligible for treatment under the Act—*which would be error*—or whether, realizing he was eligible, nevertheless deliberately opted to sentence him as an adult." *Id.* (emphasis added).

Such an error might well have a major effect on the outcome of the sentencing. Under the Act, a court might suspend sentencing and place the youth offender on probation, 18 U.S.C. § 5010(a); sentence him to non-prison custody of the Attorney General for no more than six years, 18 U.S.C. §§ 5010(b), 5017(c); or sentence him to non-prison custody of the Attorney General for longer than six years but with mandatory discharge at least one year before the maximum amount of the otherwise applicable sentence, 18 U.S.C. §§ 5010(c), 5017(d). The adult sentence imposed on petitioner here, when he was 15 years of age, was the maximum permitted—from five to 15 years incarceration in a maximum security prison.

Thus, a court's failure to consider Youth Corrections Act sentencing, and to exercise its discretion on the facts of

each case in imposing such sentencing, is an error that affects the very essence of the sentencing proceeding. It is a failure to consider the special facts of a youth offender's individual circumstances as expressly required by Congress—in short, an abdication of a critical fact-finding function. The rule of *Dorszynski*, requiring an explicit finding of no benefit, is designed to assure that such fundamental errors do not occur, and the instant case provides a graphic illustration of why the rule is necessary. The trial court made no reference at all in the 1961 sentencing proceeding to the question whether petitioner Brackett would benefit from sentencing under the Act. The court was, in its own words, "more interested in the fate that befell the guard than it is in the future of these . . . boys." (A. 43.)

The question presented is whether the *Dorszynski* rule should be given retroactive effect here and in other cases. Application of the principles articulated by the Court in past decisions demonstrates that it should. The question is important and has resulted in a conflict in the Circuits.[25]

1. *This Court's Rules of Retroactivity Require Retrospective Application of* Dorszynski.

The Court has previously made clear that the constitutional right to counsel at dispositional hearings is fully retroactive, noting that "the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence

[25] In deciding not to give *Dorszynski* retrospective effect, the Court of Appeals expressly differentiated below between issues raised in appeals and those raised in collateral attacks, holding that retroactivity may consistently be given in the first situation while not in the second. This Court has sharply criticized this approach, recognizing that such distinctions are illogical. *E.g.*, *Williams* v. *United States*, 401 U.S. at 657 and n.9.

is apparent." *McConnell* v. *Rhay*, 393 U.S. at 4, *quoting Mempa* v. *Rhay*, 389 U.S. at 135. The *Dorszynski* rule that the sentencing court must make a no benefit finding, and must make it expressly, serves the same fundamental purpose as that of the right to counsel at sentencing—to ensure that the court's attention is turned specifically to the relevant issues respecting sentencing, and in particular to an issue whose consideration Congress has mandated.[26]

2. *The Courts of Appeals Are in Conflict on This Question.*

The Courts of Appeals are widely split on the question whether *Dorszynski* should be given retrospective application. As the District of Columbia Circuit said below, "Our limitation of the retroactivity of *Dorszynski* is concededly at odds with holdings in other circuits." (A. 10.) The Fourth, Fifth, and Eight Circuits have uniformly applied *Dorszynski* retroactively,[27] while the D.C., Third, and Tenth Circuits have applied it only prospectively.[28] The Ninth Circuit has given the rule retroactive effect at least once,[29] and on a subsequent occasion declined to address the question.[30] The Sixth Circuit has at least twice avoided consideration of the issue,[31] and the Second Circuit suggested in a pre-*Dorszynski* opinion that it would not apply its explicit finding rule retrospectively.[32]

These conflicts among the Circuits should be resolved. The courts rejecting retroactivity have, as in the case of

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[26] It is unlikely that a rule giving *Dorszynski* retroactive application would result in the imposition of undue burdens on the criminal justice system; nor would such a rule offend the good faith reliance of District judges on some longstanding contrary principle. *Stovall* v. *Denno*, *supra*. First, the District judges in at least three Circuits had, prior to *Dorszynski*, been required by their own Courts of Appeals to make explicit no benefit findings. See *Brooks* v. *United States*, 497 F.2d 1059 (1974), *modified on other grounds*, 531 F.2d 317 (6th Cir. 1975); *United States* v. *Kaylor*, 491 F.2d 1133 (2d Cir.) (*en banc*), *vacated on other grounds*, 418 U.S. 909 (1974); *United States* v. *Coefield*, 155 U.S. App. D.C. 205, 476 F.2d 1152 (1973) (*en banc*). Second, it is improbable that a large number of persons who were improperly sentenced under *Dorszynski* remain in prison today: The requirement of a no benefit finding applies only to youth offenders who are in the federal system and were 21 or younger at the time of conviction; and the vast majority of eligible youths were in fact sentenced under the Act, as was intended. Third, the earliest Court of Appeals decision holding that something other than an explicit finding was permissible issued on December 20, 1972, see *United States* v. *Jarrett*, 439 F.2d 1135 (3d Cir. 1971), only 15 months before *Dorszynski* itself was decided on March 20, 1974. Thus, except for that short period of time, there was no precedent for making less than an explicit no benefit finding and, therefore, nothing on which District judges might have relied.

[27] *United States* v. *Flebotte*, 503 F.2d 1057 (4th Cir. 1974); *United States* v. *Bailey*, 509 F.2d 881 (4th Cir. 1975); *McCray* v. *United States*, 542 F.2d 1246 (4th Cir. 1976); *Hoyt* v. *United States*, 502 F.2d 562 (5th Cir. 1974); *United States* v. *Scheffer*, 506 F.2d 922 (5th Cir. 1975); *Robinson* v. *United States*, 536 F.2d 1109 (5th Cir. 1976); *Walls* v. *United States*, 544 F.2d 236 (5th Cir. 1976); *Sappington* v. *United States*, 518 F.2d 28 (8th Cir. 1975); *Brager* v. *United States*, 527 F.2d 895 (8th Cir. 1975); *Tasby* v. *United States*, 535 F.2d 464 (8th Cir. 1976); *DeVerse* v. *United States*, 536 F.2d 804 (8th Cir.), *cert. denied*, 429 U.S. 897 (1976); *United States* v. *Scruggs*, 538 F.2d 214 (8th Cir. 1976); *Rivera* v. *United States*, 542 F.2d 478 (8th Cir. 1976).

In addition, the District of Columbia Court of Appeals has given *Dorszynski* retrospective application in appeals from sentencings that occurred before *Dorszynski*. *E.g.*, *Smith* v. *United States*, 325 A.2d 180 (D.C. Ct. App. 1974).

[28] *Owens* v. *United States*, 383 F. Supp. 780 (M.D. Pa. 1974), *aff'd without opinion*, 515 F.2d 507 (3d Cir.), *cert. denied*, 423 U.S. 996 (1975); *Jackson* v. *United States*, 510 F.2d 1335 (10th Cir. 1975).

[29] *Belgarde* v. *United States*, 503 F.2d 1054 (9th Cir. 1974).

[30] *Rewak* v. *United States*, 512 F.2d 1184 (9th Cir. 1975). In addition, the District of Columbia Court of Appeals has applied to rule retroactively. *E.g.*, *Smith* v. *United States*, 325 A.2d 180 (D.C. Ct. App. 1974).

[31] *Coleman* v. *United States*, 532 F.2d 1062 (6th Cir.), *cert. denied*, 429 U.S. 847 (1976); *McKnabb* v. *United States*, 551 F.2d 101 (6th Cir. 1977).

[32] *United States* v. *Kaylor*, *supra*.

those dealing with the *Kent* and *Gault* issue, failed to focus on what, under this Court's rulings, is the central retroactivity question: whether the *Dorszynski* rule is essential to the integrity of the sentencing process. The reasoning of the Second Circuit in *United States* v. *Kaylor*, for example, is inapposite, because the court considered only the second and third factors enumerated in *Stovall* (reliance and effect on the administration of criminal justice) and not the first and most important factor—the purpose of the rule requiring an explicit finding.

The D.C. Circuit has rejected retroactivity on the ground that no adequate remedy was available, noting that in *Mordecai* it had followed the same course for the same reason with respect to *Kent*.[33] But as noted above, this disposition in *Mordecai* was clearly wrong: This Court was confronted in *Kent* with precisely the same facts as those in *Mordecai*, and the Court specifically rejected the contention that no adequate remedy was available. The Court held that if waiver was improper, the conviction of Kent must be vacated.

Here, by the same token, the case should be remanded to the District Court for a hearing, *nunc pro tunc*, on whether petitioner should have been sentenced under the Youth Corrections Act. Petitioner's conviction should be vacated if it is determined on remand (1) that Youth Corrections Act treatment would have been appropriate and (2) that such treatment cannot now be afforded. Alternatively, the remainder of petitioner's adult sentence—approximately four years—should be set aside. If, on the other hand, the District Court were to find that the trial court's rejection of youth sentencing was apt, it should enter an appropriate order.

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[33] A. 7.

C. *The Failure of the Court below to Give* Tucker *Retrospective Application Conflicts with the Standards Prescribed by This Court for Retroactivity and with Decisions of Other Circuits and of State Supreme Courts.*

Petitioner alleged in his *pro se* Section 2255 motion that his sentence is invalid under *United States* v. *Tucker* since the trial judge had given attention to petitioner's earlier convictions and those convictions were improperly obtained in violation of petitioner's constitutional right to counsel. The Government's response, which was adopted by the District Court (A. 66), said only that

> "[w]ithout indicating more specifically what prior convictions or what statements or under what circumstances they were made, these allegations must be considered insufficient as stating any grounds for relief." (A. 69.) (Citations omitted.)

The Court of Appeals affirmed without opinion. (A. 20.)

It seems improbable that the basis of the Court of Appeals' affirmance could have been the rationale offered by the Government and relied on by the District Court, since the Government's position was so clearly wrong. First, the sentencing transcript that was before the District Court, the Court of Appeals, and this Court (A. 40-44) demonstrates that the sentencing judge did give attention to petitioner's earlier convictions. Second it is clear that if, as petitioner contended in his motion, petitioner was improperly denied counsel at the proceedings leading to those convictions, the convictions were invalid. *Berry* v. *City of Cincinnati*, 414 U.S. 29 (1973); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *In re Gault*, *supra*. And third, it is clear that petitioner's allegation of these facts is sufficient to state a claim for relief, see *Berry* v. *City of Cincinnati*, *supra*; *Kitchens* v. *Smith*, 401 U.S. 847 (1971), and entitles him, at a minimum, to a hearing. See 28 U.S.C. § 2255 ("Unless the motion and the files

and records of the case *conclusively* show that the prisoner is entitled to no relief, the court *shall* . . . grant a prompt hearing thereon . . . ." (Emphasis added.)).[34]

The only other possible basis for the Court of Appeals' decision is a determination that *Tucker* should not be given retrospective application—an issue briefed before the Court of Appeals. Such a result, however, is contrary to the principles of retroactivity articulated in the decisions of this Court and is in conflict with the decisions of other Circuits and of the state supreme courts.[35]

This Court's decisions reflect the special importance of the right to representation by counsel at trial. The Court has held that, in the absence of waiver, a conviction of "an offense, whether classified as petty, misdemeanor, or felony" is invalid if it was obtained in a court that denied the defendant the assistance of a lawyer. *Argersinger* v. *Hamlin, supra; Gideon* v. *Wainwright, supra.* And the Court has held this rule to be fully retroactive.[36]

This Court has also made clear that convictions invalid under *Argersinger* or *Gideon* may not be relied on in later prosecutions to prove guilt or to increase punishment. Thus, in *Burgett* v. *Texas*, 389 U.S. 109 (1967), the Court reversed a conviction obtained in the following

[34] If the Court of Appeals had based its affirmance on the contention made by the Government before the trial court, summary reversal would be appropriate here.

[35] There is also a conflict in the Circuits on the question whether a habeas petitioner must, before obtaining relief under *Tucker* in the federal courts, exhaust all his state remedies, including all avenues of collateral attack under state law. That question is not presented here, since petitioner Brackett was tried, convicted, and sentenced in the United States District Court for the District of Columbia where he subsequently filed the Section 2255 motion that led to this review proceeding.

[36] See *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963), and *Kitchens* v. *Smith, supra*, respecting the retroactivity of *Gideon; Berry* v. *City of Cincinnati, supra*, holding *Argersinger* retroactive.

circumstances: An indictment charging petitioner with assault contained allegations of previous felony convictions—allegations that, if proved, would have increased the punishment under the state recidivist statutes. The indictment was read to the jury at the beginning of the trial, and records of the convictions were offered in evidence during trial, although it appeared that at least one conviction had been obtained in violation of *Gideon*. The Court held:

> "To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt *or enhance punishment for another offense* (see *Greer* v. *Beto*, 384 U.S. 269) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115 (emphasis added).

In *United States* v. *Tucker*, 404 U.S. 443 (1972), the Court applied *Burgett* to hold that a sentence imposed by a judge who "gave explicit attention" to prior convictions that were void under *Gideon* is also invalid.[37] Thus, *Burgett* and *Tucker* make clear that neither the jury nor the judge can consider prior invalid convictions in any context—recidivist statutes or sentencing—that could result in increased punishment.

The *Tucker* rule clearly warrants retrospective application. Its underpinning—the *Burgett* holding—has already been applied retrospectively. See *Loper* v. *Beto*, 405 U.S. 473 (1972). Indeed, in *Tucker* itself the rule of the *Burgett* case was applied to a sentence that antedated the 1967 *Burgett* decision. Moreover, the Courts of Appeals[38]

[37] The Chief Justice and Mr. Justice Blackmun concurred in the principle enunciated by the Court in *Tucker* but dissented with respect to its application to particular facts of Tucker's case.

[38] *E.g., United States* v. *Walters*, 526 F.2d 359 (3d Cir. 1975); *Irby* v. *Missouri*, 502 F.2d 1096 (8th Cir. 1974), *cert. denied*, 425

and the state supreme courts [39] have uniformly treated *Tucker* as retroactive. The Court of Appeals' failure here to remand for a hearing on petitioner's *Tucker* allegations was, therefore, clear error and should be reversed.

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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U.S. 997 (1976); *Collins* v. *Buchkoe*, 493 F.2d 343 (6th Cir. 1974); *United States* v. *Radowitz*, 507 F.2d 109 (5th Cir. 1974); *Mitchell* v. *United States*, 482 F.2d 289 (5th Cir. 1973); *Craig* v. *Beto*, 458 F.2d 1131 (5th Cir. 1972); *Garrett* v. *Swenson*, 459 F.2d 464 (8th Cir. 1972); *Lipscomb* v. *Clark*, 468 F.2d 1321 (5th Cir. 1972); *Russo* v. *United States*, 470 F.2d 1357 (5th Cir. 1972).

[39] *E.g.*, *Commonwealth* v. *Calvert*, 344 A.2d 797 (Pa. 1975); *People* v. *Moore*, 391 Mich. 426, 216 N.W.2d 770 (1974); *Howard* v. *State*, 280 So.2d 705 (Fla. Ct. App. 1973); *Towers* v. *Director, Patuxent Institution*, 16 Md. App. 678, 299 A.2d 461 (Ct. Spec. App. 1973); *Crowe* v. *State*, 194 N.W.2d 234 (S. Dak. 1972).